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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 504

AUSTRAL OIL COMPANY INCORPORATED,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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Petitioner, Austral Oil Company Incorporated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on May 24, 1967.

CITATION TO OPINION BELOW

The opinion and judgment for the Court of Appeals for the Fifth Circuit is not yet reported but is printed in Appendix "A", *infra,* pp. 1a-41a.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and section 19(b) of the Natural Gas Act, 15 U.S.C. § 717 r(b).

STATUTES INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. § 717-717w, provides in pertinent part as follows:

Section 7(c), 15 U.S.C. § 717f(c)

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

Section 7(e), 15 U.S.C. § 717f(e):

> [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is

found that the applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale,* * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted hereunder such reasonable terms and conditions as the public convenience and necessity may require.

QUESTION PRESENTED

The Federal Power Commission issued *temporary* certificates of public convenience and necessity authorizing producers to commence sales of natural gas. The Commission conditioned these temporary certificates to require a reduction in the proposed contract prices. Having thus reduced the prices sought by the producers to a level it considered consistent with the public interest, the Commission did not exercise its power to condition the temporary certificates to require the producers to refund amounts collected at the conditioned price. Subsequently, the Commission issued *permanent* certificates of public convenience and necessity for these sales conditioned upon a lower price than the reduced price authorized by the temporary certificates. The question presented is whether the Commission may condition the permanent certificates to require the producers to refund amounts collected under their temporary certificates.

STATEMENT

Petitioner contracted to sell natural gas in interstate commerce at an initial price of 20.045¢ per Mcf. Pursuant

to section 7 of the Natural Gas Act and the regulations promulgated thereunder,[1] the Federal Power Commission issued Petitioner a *temporary* certificate of public convenience and necessity to commence such sale.

In *CATCO*[2] this Court had admonished the Commission "to hold the line" on gas prices. Accordingly the Commission conditioned Petitioner's temporary certificate to reduce the proposed initial price to 18¢ per Mcf — the area guideline price established by the Commission when it decided to regulate natural gas producers on an area basis.[3] However, the temporary certificate issued to Petitioner did not contain a condition notifying Petitioner that any of the amounts collected under the temporary certificate might have to be refunded with interest at such time as a permanent certificate was granted. Such "refund conditions" are commonly attached to temporary certificates when there is any question as to whether the price level authorized might be found to be too high after the closer scrutiny required for permanent certification. Petitioner filed its written acceptance of this temporary certificate and commenced deliveries of gas at the 18¢ per Mcf price provided therein.

More than four years later, the Commission issued Petitioner a *permanent* certificate of public convenience and necessity, which was conditioned on a price of 15¢ per Mcf. The Commission deferred deciding the question of whether Petitioner should be required to refund all or any part of the difference between the 18¢ per Mcf collected pursuant to the price condition imposed on its temporary

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[1] 18 CFR § 157.28.

[2] *Atlantic Refining Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

[3] *Statement of General Policy No. 61-1*, issued September 28, 1960 (24 F.P.C. 818).

certificate and the 15¢ price condition imposed on its permanent certificate.

Petitioner and other producers sought review in the court below challenging the price condition imposed on their permanent certificates and the failure of the Commission to hold that it had no power to require refunds with respect to amounts collected under their temporary certificates. The court of appeals sustained the price condition imposed by the Commission on the permanent certificates. It also held that the Commission has the power to condition permanent certificates to require refunds of amounts collected pursuant to temporary certificates which did not contain a refund condition.[4]

REASONS FOR GRANTING THE WRIT

Whether the Federal Power Commission has the power to condition a permanent certificate to require a producer of natural gas to refund amounts collected under a temporary certificate which did not contain a refund condition is a question of substantial importance in the administration of the Natural Gas Act and one on which the circuits are divided. In addition, the ruling is predicated upon an erroneous interpretation of a recent decision by this Court. The particular importance of this case derives from the fact that in issuing temporary certificates the Commission exercised its price conditioning power and required Petitioner and other producers to file written acceptance of such reduced prices prior to commencing deliveries pursuant to their tem-

[4] Before the court of appeals rendered its decision, the Commission in Opinion 499, the Commission ordered refunds of certain amounts that Petitioner and other producers collected pursuant to temporary certificates. On September 2, 1966, the Commission granted applications for rehearing of Opinion 499 and has taken no further action.

porary certificates. Therefore, while it may be appropriate to consolidate this case with the Commission's pending petitions requesting review of conflicting decisions rendered by the Tenth Circuit, Petitioner respectfully submits that the particular circumstances presented here require that the decision of the Fifth Circuit also be reviewed.

1. The decision of the court below on the question of the Commission's power to order refunds is admittedly in conflict with the decisions of the United States Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co.* v. *FPC*, 370 F. 2d 181 (10th Cir. 1966);[5] *Pan American Petroleum Corp.* v. *FPC*, 376 F. 2d 161 (10th Cir. 1967); *Standard Oil Co. of Texas* v. *FPC*, 376 F. 2d 578 (10th Cir. 1967).[6] See also *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F. 2d 404 (10th Cir. 1959). This conflict was recognized and cogently stated by Judge Dyer as follows:

> "With deference to the Tenth Circuit, we disagree with the reasoning in *Sunray Mid-Continent* and the decisions following it insofar as those decisions reject the power of the FPC to order refunds, if it is made to appear that it is appropriate to do so, in whole or in part, after weighing all equitable considerations." (Footnote omitted) (Appendix A, *infra* 40a.)

Further, it should be noted that these recent decisions by the Tenth Circuit are in conflict with an earlier decision by the court of appeals for the District of Columbia. See *Public Service Comm'n* v. *FPC*, 329 F.2d 242 (D.C. Cir.), *cert. denied sub nom, Prado Oil and Gas Co.* v. *FPC*, 377 U.S. 963 (1964). Thus, in *Pan American Petroleum Corp.*

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[5] Petitions for certiorari filed by the Federal Power Commission and others in Nos. 1133-1135, October Term, 1966.

[6] Petition for certiorari filed by the Federal Power Commission in No. 1227, October Term, 1966.

v. *FPC*, 376 F.2d 161 (10th Cir. 1967), the Tenth Circuit stated:

> On authority of the *Skelly* case, Public Service Comm'n of New York v. FPC, D.C. Cir., 329 F.2d 242, *cert. denied sub nom.* Prado Oil and Gas Co. v. FPC, 377 U.S. 963, the Commission has ruled that it has both the power and the duty to require refunds of amounts collected in excess of the in-line price even where temporary authorizations are silent as to potential refund liability. . . .
>
> We held in *Sunray DX* that refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition. We adhere to that decision for purposes of this case and see no reason for duplication here of principles and views already discussed. (Footnote omitted.) 376 F.2d at 171-72

The question of the power of the Federal Power Commission to require refunds of amounts collected pursuant to temporary certificates containing no refund condition is obviously of utmost importance to producers and consumers alike.[7] As noted by the court below, it is a question "in which there has been a conspicuous lack of unanimity" with a resulting "vacillation" in the position taken by the Commission. Only this Court can resolve the existing conflict. Resolution of this conflict at the earliest possible time is desirable in order to remedy the practical operating problems created by the present uncertainty. This is particularly true from the standpoint of the small producer, such as Petitioner, since a substantial portion of his total income often is derived from sales under temporary certificates.

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[7] The magnitude of the financial importance of this question is spelled out in the Commission's petition in No. 1133, October Term, 1966.

2. The decision of the court below is based in part upon the rationale of this Court's decision in *Callery*.[8] Thus, Judge Dyer states: "We think that the *Callery* rationale is persuasive in the circumstances of this case." Petitioner submits that the court below has misconstrued *Callery*. In that case a number of producers had collected prices pursuant to *permanent* certificates which were judicially attacked and reversed. Subsequently, new permanent certificates were issued at a lower price. In sustaining the Commission's power to order refunds under these circumstances, the Court made clear that the touchstone of its decision was the fact that the permanent certificates had never become final, stating:

> "[The Commission's] order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order . . . *Under these circumstances,* the Commission could properly conclude that the public interest required the producer to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." (Emphasis supplied.) 382 U.S. at 229-30.

The court below erroneously equated the "circumstances" deemed critical in *Callery* with the fact that the refund question in the present case involves amounts collected pursuant to *temporary* certificates. Admittedly, the temporary feature of the certificate issued Petitioner was important: it meant that the Commission was not bound by the issuance of such temporary certificate to issue an identical permanent certificate after hearing. However,

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[8] *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223 (1965).

this is no reason to conclude that the Commission can retroactively reduce the prices prescribed in such temporary certificate by ordering refunds as a condition to the issuance of the permanent certificate. The Commission's order issuing such temporary certificate was never attacked and became final.[9] Therefore, the Commission had no power to order reparations in the guise of a condition on Petitioner's permanent certificate. Thus, in *Callery*, this Court noted:

> "While the Commission 'has no power to make reparation orders,' Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 618, 88 L.Ed. 333, 353, 64 S.Ct. 281, its power to fix rates under §5 being prospective only, Atlantic Refining Co. v. Public Service Comm'n, supra, 360 U.S. at 389, 3 L.Ed. 2d at 319, it is not so restricted where its order, which never became final, has been overturned by a reviewing court." 382 U.S. at 229

Here no order was overturned by a reviewing court. Instead, the Commission issued Petitioner a temporary certificate subject to a price condition; Petitioner agreed in writing to accept the reduced price and commenced deliveries of gas. Since there was no appeal, the Commission's order became final, and the amounts collected thereunder are not subject to reparation directly or indirectly in the guise of a condition in Petitioner's permanent certificate.

Callery clearly recognizes that once a Commission order fixing rates becomes final and no longer subject to judicial review, the rates fixed cannot be retroactively changed. The Tenth Circuit correctly interpreted *Callery* when it held that the Commission cannot require a producer to re-

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[9] The Commission's orders issuing temporary certificates are final orders reviewable by the courts of appeal pursuant to section 19(b) of the Natural Gas Act [15 U.S.C. § 717r(b)]. See *Public Serv. Comm'n* v. *FPC*, 327 F.2d 893, 895 (D.C. Cir. 1964).

fund amounts collected pursuant to a final unconditional temporary certificate, and then noted:

> "The rule would not apply of course where an unconditional temporary certificate has not become final and is overturned by a reviewing court. United Gas Improvement Co. v. Callery Properties, Inc., 328 U.S. 223, 229."

This is the rationale of *Callery*. The contrary interpretation by the court below is erroneous and should be corrected.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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